Arent Fox
1050 Connecticut Avenue, NW
Washington, DC 20036-5339

ORIGINAL

DOCKET FILE COPY ORIGINAL

Mitchell Lazarus
Tel: 202/857-6466
Fax: 202/857-6395
lazarusm@arentfox.com
http://www.arentfox.com

June 16, 1997

RECEIVED

JUN 16 1997

Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street NW
Washington DC 20554

Re: Reply of Sierra Digital Communications, Inc. to Oppositions to Petition for Partial Reconsideration
CC Docket No. 92-297

Dear Mr. Caton

Pursuant to Section 1.429 of the Commission's Rules and on behalf of Sierra Digital Communications, Inc., I enclose the original and 11 copies of the above-referenced Reply to Oppositions to Petition for Partial Reconsideration for filing with the Commission.

Kindly date-stamp and return the enclosed extra copy of this cover letter.

If there are any questions about this filing, please call me directly at the number above.

Respectfully submitted,

Mitchell Lazarus

Enclosure

cc (w/encl): Hal Tenney
Sierra Digital Communications, Inc.

No. of Copies rec'd 0+11
List ABCDE

ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington DC 20554

In the Matter of	)	
	)	
Rulemaking to Amend Parts 1, 2, 21, and 25	)	
of the Commission's Rules to Redesignate	)	
the 27.5-29.5 GHz Frequency Band, to	)	CC Docket No. 92-297
Reallocate the 29.5-30.0 GHz Frequency Band,	)	
to Establish Rules and Policies for Local	)	
Multipoint Distribution Service and for Fixed	)	
Satellite Services	)	

REPLY OF SIERRA DIGITAL COMMUNICATIONS, INC. TO
OPPOSITIONS TO PETITION FOR PARTIAL RECONSIDERATION

Sierra Digital Communications, Inc. ("Sierra") filed a Petition for Partial Reconsideration ("Sierra Petition") in the above-captioned proceeding on May 5, 1997. Letters in support were filed by CommPare, Inc. (May 29, 1997); CSG Wireless, Inc. (June 13, 1997); Parsons Transportation Group, Inc. (May 28, 1997); State of Nevada Department of Transportation (May 29, 1997) (proposing alternative resolution); Sunnyvale GDI (May 14, 1997); VisonLinx, Inc. (May 9, 1997); and Westec Communications, Inc. (June 2, 1997). Oppositions to Sierra's Petition were filed by CellularVision USA, Inc. ("CellularVision") and Texas Instruments, Inc. ("TI"). Sierra now replies to those oppositions.

A. The Commission Should Not Allocate the 31.000-31.075 and 31.225-31.300 GHz Sub-bands to LMDS, but Should Retain Them for Point-to-Point Use.

The Second Report and Order allocated a total of 1,150 MHz of unencumbered spectrum to LMDS — 850 MHz at 28 GHz, plus all 300 MHz of the 31 GHz band — and in addition

allocated another 150 MHz suitable for hub-to-subscriber use, for a total of 1,300 MHz of usable spectrum.[1/] The Commission announced it would divide this spectrum into two licenses for each BTA. One license includes all 1,000 MHz in the 28 GHz band, plus the central 150 MHz in the 31 GHz band, for a total of 1,150 MHz. The other license includes only the two 75 MHz outer edges of the 31 GHz band, subject to interference protection for incumbent 31 GHz licensees.

Sierra's Petition requests that the spectrum represented by the smaller license — the 75 MHz outer edges of the 31 GHz band — not be licensed as part of LMDS, but instead be reserved for point-to-point use.[2/] This will give LMDS fully 1,000 MHz of unencumbered spectrum (850 MHz at 28 GHz, plus 150 MHz at 31 GHz), and another 150 MHz at 28 GHz for hub-to-subscriber use. LMDS proponents have never shown a need for more than that amount of spectrum. A grant of Sierra's request will also provide 150 MHz of point-to-point spectrum at 31 GHz, which will serve the public interest by meeting the needs of point-to-point applications in the band.

1. LMDS interests still have not shown a need for more than 1,000 MHz of unencumbered spectrum.

In almost a year since the Commission first proposed reallocating the 31 GHz band,[3/] LMDS proponents still have not made a factual showing, or even a credible assertion, that a provider needs more than 1,000 MHz of unencumbered spectrum to offer a viable LMDS service.

[1/] Second Report and Order, Order on Reconsideration, and Fifth Notice of Proposed Rulemaking, FCC 97-82 (released March 13, 1997) ("Second Report and Order").

[2/] Sierra Petition at 2-15.

[3/] First Report and Order and Fourth Notice of Proposed Rulemaking, 11 FCC Rcd 19005 (1996) ("Fourth Notice").

Nor does CellularVision's Opposition attempt such a showing. Instead, CellularVision offers a revisionist history that purports to explain how the 150 MHz windfall to LMDS at 31 GHz is actually a deprivation. First, CellularVision cites a long-abandoned 1993 proposal that would have established two LMDS licensees in each market, each with 1 GHz of spectrum. CellularVision next looks to the Commission's intent to issue separate licenses for 1,150 and 150 MHz, and implies that these are direct successors to the two originally-proposed 1 GHz licenses. "Thus," writes CellularVision, "while maintaining its dual licensing approach, the Commission's two LMDS licenses per BTA were allocated far less spectrum than originally proposed."[4/] But this conclusion depends on two separate fallacies. First, CellularVision overlooks the Commission's intervening decision to license only one LMDS provider per BTA at 1,000 MHz. Second, for CellularVision to believe the Commission has maintained a "dual licensing approach," it must also believe the 150 MHz license at 31 GHz by itself is enough for a viable LMDS offering. But no one believes that. And indeed, the Commission made clear in the Fourth Notice that the allocation at 31 GHz is intended to supplement the allocation at 28 GHz, not to compete with it.[5/]

TI's Opposition likewise also fails to offer any factual support for an LMDS allocation greater than 1,000 MHz. TI's sole showing on this issue consists of citations to the Commission's statements that "each LMDS operator must have <u>at least</u> 1 gigahertz of unencumbered spectrum" (TI's emphasis),[6/] and that giving LMDS all of the 31 GHz band will "facilitate" LMDS's ability to

---

4/ CellularVision Opposition at 7.

5/ Fourth Notice, 11 FCC Rcd at 19045-46.

6/ TI Opposition at 5.

deliver services to the public.[7] But neither TI nor the Commission has supported these surmises with facts. To the contrary, these statements merely add up the unremarkable proposition that more spectrum is better — hardly a basis for reasoned policy-making.[8] There is not a word in the record to document why LMDS could not succeed without the 31 GHz outer bands.

2. The public interest in point-to-point applications at 31 GHz far outweighs the speculative needs of LMDS.

In contrast to the conjectures of the LMDS interests, Sierra has set out in detail the important services, particularly public safety services, that depend critically on continued access to the 31 GHz band.[9] Sierra explained in its Petition that these include traffic signal interconnection, traffic monitoring, interconnecting cellular and PCS cell sites, last mile drop-off for fiber optic rings, PBX range extension, remote medical imaging, television programming distribution, and extending coverage of LAN and WAN networks. Several municipal and state agencies, both individually and through the International Municipal Signal Association, provided detailed supporting information.

The Commission acknowledged the public interest in these applications.[10] Rather than attempt to argue otherwise, CellularVision and TI instead focus on the number of licenses in the

---

[7] TI Opposition at 5.

[8] Similarly, TI asserts that the need for more than 1 GHz of spectrum for LMDS "has been well-established," TI Opposition at 6, but it does not say how.

[9] Sierra Petition at 10-14. *See id.* for citations to the record summarized below. *See also* Letter of Parsons Transportation Group, Inc. (May 28, 1997); Letter of State of Nevada Department of Transportation (May 29, 1997); Letter of Sunnyvale GDI (May 14, 1997); Letter of VisonLinx, Inc. (May 9, 1997); and Letter of Westec Communications, Inc. (June 2, 1997).

[10] Second Report and Order at ¶¶ 56, 59-62, 67.

band.[11] Sierra has explained in detail that, until recently, equipment in the band was too expensive for widespread use, and that installations began going up sharply as prices came down to a level that local governments and other users could afford.[12] Neither CellularVision nor TI questions Sierra's showing that applications in the band have been rising quickly, and at an increasing rate, despite the chilling effect of the Fourth Notice.[13] Their failure to respond to this evidence is striking, considering that LMDS's claims of need for spectrum rest entirely on speculations about future markets — projections with far less factual underpinning than Sierra's records of actual orders and installations. It would be arbitrary and capricious for the Commission to give full credit to LMDS's projections while ignoring the proven exponential growth in 31 GHz demand, especially for public safety applications.

Sierra has also explained why public safety users typically can neither purchase service from an LMDS provider nor bid on the spectrum themselves.[14] CellularVision's off-hand dismissal of these facts reflects a deep misunderstanding of how public safety agencies operate.[15] CellularVision says, "Just like the Nevada Department of Transportation or any other potential point-to-point service provider, any potential LMDS small business bidder faces the same challenges of attracting financing, possible forming a bidding consortium, and ultimately facing the

---

[11] CellularVision Opposition at 4-5; TI Opposition at 6-7.

[12] Sierra Petition at 6-10. *See also* Comments of Sierra Digital Communications, Inc. at 2-3 (filed Aug. 12, 1996); Letter of Mitchell Lazarus to William F. Caton at 5 (Sept. 19, 1996).

[13] Sierra Petition at 6-10.

[14] Sierra Petition at 12-13.

[15] CellularVision Opposition at 8.

marketplace uncertainties of an FCC spectrum auction."[16] The Nevada DOT is not a "service provider," but an agency of government. Its "challenges of attracting financing," etc., are utterly different from those of a small business bidder. Surely CellularVision does not think a tax-supported state or municipal public safety agency can sell stock to investors, or that its proper role includes either "facing the marketplace uncertainties" or reselling service in competition with the private sector. And surely CellularVision understands why a government agency will be reluctant to entrust its public safety communications to a commercial provider.

Finally, both CellularVision and TI rehash the discredited argument that the absence of interference protection at 31 GHz band justifies reallocating the band to LMDS.[17] Their point is inapposite for two reasons. First, the argument was invalidated by the U.S. Court of Appeals for the District of Columbia,[18] which squarely held that a service's unprotected character does not excuse the Commission from considering its public interest. And second, after considering the argument, the Commission declined to rely on it in promulgating the challenged rules.[19] In short, the 31 GHz interference rules have no bearing on this proceeding.

16/ CellularVision Opposition at 8.

17/ CellularVision Opposition at 3; TI Opposition at 8.

18/ H&B Communications Corp. v. FCC, 420 F.2d 638 (D.C. Cir. 1969).

19/ The Commission recited the argument in summarizing the comments, but did not invoke it to support the allocation to LMDS. *See* Second Report and Order at ¶¶ 63-66. The Commission also acknowledged that the 31 GHz technical rules provided effective alternative means of preventing interference. Id. at ¶ 65.

B. In the Alternative, the Commission Should Reinstate Pending Applications in the 31 GHz Band.

Sierra's Petition asked the Commission, in the alternative, to reinstate the 31 GHz applications filed between the release of the Fourth Notice, on July 22, 1996, and release of the Second Report and Order on March 13, 1997; to give the reinstated applications the same interference protections as the incumbents; and to permit applicants in the middle sub-band to amend to the outer sub-bands.[20/]

TI's opposition to this request cites the Commission's statements that the 31 GHz band is important to LMDS, and concludes that the requested reinstatements would "entirely upset" the intended purpose and objectives of the Commission's plan for 31 GHz.[21/] CellularVision makes a similar argument.[22/]

Sierra has explained in its Petition (and summarizes above) that LMDS has not shown a need for more than 150 MHz of the 31 GHz band, and that the Commission can best balance the competing public interest considerations in LMDS and point-to-point services by reserving half of the 31 GHz band for private point-to-point use. If the Commission disagrees, it can achieve a different balance, albeit one tilted steeply toward LMDS, by allocating all of the 31 GHz band to LMDS and reinstating the applications pending at the time of the Second Report and Order. These applications request authority to build and operate specific systems to meet identified needs. The Commission frankly acknowledged that the dismissal of at least some of these

---

[20/] Sierra Petition at 15-16.

[21/] TI Opposition at 9.

[22/] CellularVision Opposition at 6, n.20.

applications will "create unexpected disruptions and expenses."[23/] But their dismissal is unnecessary. The locations and frequencies of the requested facilities are already on file with the Commission, and can easily be made known to would-be LMDS licensees long before detailed system designs for LMDS must be finalized.

To be sure, the reinstatement will impose minor interference constraints on LMDS. TI's Opposition, however, is curiously inconsistent about those constraints. On the one hand, TI defends reallocating all of 31 GHz to LMDS on the ground that point-to-point applications make insufficient use of the band.[24/] But if point-to-point interest is slight, as TI maintains, then TI cannot also say that reinstating the pending applications will "entirely upset" LMDS's use of the band.[25/] On the other hand, if the number and scope of pending applications are great enough that reinstating them will truly jeopardize LMDS, then TI cannot justify reallocating the band by saying it is underutilized. TI cannot have it both ways. TI cannot credibly dismiss Sierra's argument that growth justifies reserving spectrum for point-to-point licensing, and still maintain that reinstatement of the applications will seriously disrupt LMDS.

Finally, TI questions Sierra's assertion that the Fourth Notice did not provide adequate notice to potential point-to-point applicants.[26/] The Fourth Notice, released on July 22, 1996, was the Commission's first indication that the 31 GHz band might no longer be available to point-to-point users. And in the Second Report and Order, the Commission announced the dismissal of all

---

23/ Second Report and Order at ¶ 101.

24/ TI Opposition at 6.

25/ TI Opposition at 9.

26/ TI Opposition at 9-10.

applications filed after July 22, 1996. There was no effective notice because there was not a single day when potential applicants both had notice of the proposed change in the rules, and could have acted on that notice to protect their position. Those who did attempt to act, by filing applications after July 22, 1996, are now frustrated by the Commission's announced intention to dismiss those applications. Thus, the Commission's purported reliance on adequate notice in dismissing the applications was incorrect,[27/] and the Commission should remedy the error by reinstating the applications.

C. The Commission Should Rescind the Frequency Tolerance for the 31 GHz Band Specified in Section 101.107.

Sierra's Petition asked the Commission to rescind the new and tighter 0.001% tolerance requirement as to the outer sub-bands at 31 GHz band, regardless of its actions on the other issues in the Petition, and in the alternative to delay imposing the 0.001% requirement for a period of two years.[28/] Sierra explained there will be no need for the tighter tolerance if the Commission reconsiders its decision to reallocate the outer sub-bands to LMDS. In the alternative, if the Commission reinstates the pending licenses, the applicants should be able to construct under the rules in effect at the time that they filed. If the Commission does not reconsider the reallocation (and even if it does reinstate the pending licenses), public-safety users that can reach an accommodation with the BTA licensee may not be able to afford equipment built to the new tolerance, at least in the short term. Moreover, the new tolerance is intended solely to facilitate frequency coordination, which is not required at all except within 20 km of the BTA boundary,

---

[27/] Second Report and Order at ¶ 100.

[28/] Sierra Petition at 18-22.

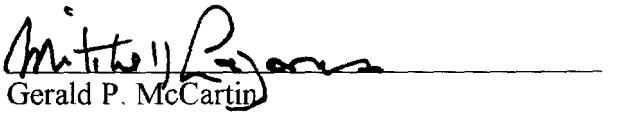
and even there is less likely to be required at 31 GHz than at 28 GHz.[29/] Finally, Sierra questioned whether the Commission gave adequate legal notice of its intent to impose this requirement at 31 GHz.[30/]

No party has opposed this aspect of Sierra's Petition, and the Commission should grant it forthwith.

CONCLUSION

For the reasons set out above, the oppositions to Sierra's Petition are without factual or legal support, and the Petition should be granted.

Respectfully submitted,



Gerald P. McCartin
Mitchell Lazarus
Arent Fox Kintner Plotkin & Kahn
1050 Connecticut Avenue, N.W.
Washington, DC 20036-5339
(202) 857-6466
Counsel for
Sierra Digital Communications, Inc.

Sierra Digital Communications, Inc
4111 Citrus Avenue.
Suite #5
Rocklin CA 95677
(916) 624-7313

June 16, 1997

29/ Sierra Petition at 20-21.

30/ Sierra Petition at 21-22.

CERTIFICATE OF SERVICE

I, Mitchell Lazarus, do hereby certify that on this 16th day of June, 1997, I have caused copies of the foregoing Reply of Sierra Digital Communications, Inc. to Oppositions to Petition for Partial Reconsideration to be served by hand upon the following, except that those marked with an asterisk were served via first-class mail:

Chairman Reed E. Hundt
Federal Communications Commission
Room 814 - Stop 0101
1919 M Street NW
Washington DC 20554

Commissioner Rachelle B. Chong
Federal Communications Commission
Room 844 - Stop 0105
1919 M Street NW
Washington DC 20554

Commissioner Susan Ness
Federal Communications Commission
Room 832 - Stop 0104
1919 M Street NW
Washington DC 20554

Commissioner James H. Quello
Federal Communications Commission
Room 802 - Stop Code 0106
1919 M Street NW
Washington DC 20554

William E. Kennard
General Counsel
Federal Communications Commission
Room 614 - Stop Code 1400
1919 M Street NW
Washington DC 20554

Daniel B. Phythyon, Acting Chief
Wireless Telecommunications Bureau
Federal Communications Commission
Room 5002 - Stop Code 2000
2025 M Street, N.W.
Washington DC 20554

David Wye, Legal Advisor
FCC Wireless Telecommunications Bureau
Room 8102 - Stop Code 2000F
2025 M Street, N.W.
Washington, DC 20554

Michael R. Gardner, Esquire*
William J. Gildea, III, Esquire
Harvey Kellman
Counsel for CellularVision USA, Inc.
The Law Offices of
Michael R. Gardner, P.C.
1150 Connecticut Ave., NW., Suite 710
Washington, DC 20036

Robert L. Pettit, Esquire*
A. B. Cruz III
Wiley, Rein & Fielding
Counsel for Texas Instruments, Inc.
1776 K Street, NW
Washington, DC 20006

Per Skullesta, President*
Commpare, Inc.
2050A Wharf Road
Capitola, CA 95010

Franklin R. Ribelin, President*
Sunnyvale GDI Inc.
280 Interstate 80, Exit 1
P.O. Box 1330
Verdi, NV

David M. Grant*
Vice President and General Manager
Westec Communications, Inc.
13402 N. Scottsdale Road, Bldg. B
Scottsdale, AZ 85254

Robert Way, President*
VideoLinz, Inc.
4824 Sunset Forest Circle
Holly Springs, NC 27540

Roger Grable*
Assistant Director-Administration
The Nevada Department of Transportation
1263 S. Stewart Street
Carson City, NV 89712

P.D. Kiser, P.E.*
Traffic Engineering Manager
Parsons Transportation Group Inc.
1755 East Plumb Lane, Suite 155
Reno, NV 89502

Albert R. Pfeltz*
Vice President, Sales and Marketing
CSG Wireless, Incorporated
1309 West Marlboro Drive
Chandler, AZ 85224

Mitchell Lazarus